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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 48

THE UNITED STATES, PETITIONER

v.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 9–11) is reported in 17 F. Supp. 980.

JURISDICTION

The judgment of the Court of Claims was entered February 8, 1937 (R. 11). The petition for a writ of certiorari was filed May 8, 1937 (R. 11), and was granted October 11, 1937. The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The respondent filed a timely claim for refund of Federal income tax on certain specific grounds. Subsequently, after the statutory period of limitation for filing refund claims had expired, the respondent filed a second claim for refund on an entirely different ground as "an amendment and amplification" of the timely claim. The sole question is whether recovery may be permitted on the second claim as an amendment of the first claim.

STATUTES AND TREASURY REGULATIONS INVOLVED

The applicable portions of the pertinent statutes and Treasury regulations will be found in the Appendix, *infra*, pp. 29–32.

STATEMENT

This suit was brought by the respondent to recover Federal income tax paid for the calendar year 1930. The case was submitted upon an agreed statement of facts. The special findings of fact of the Court of Claims may be summarized as follows:

The respondent, as executrix of the estate of Matthew Andrews, deceased, filed, on or about March 15, 1931, an individual income tax return for the calendar year 1930 for the estate showing a tax due of $12,800.30 which was paid in 1931 (R. 5). The gross income shown on the return included an amount of $110,891.50, representing dividends from domestic corporations. Of this amount

$36,750.00 was reported as dividends received in the year 1930 from The M. A. Hanna Company, hereinafter called the Hanna Company (R. 6).

The amount of $36,750.00 was derived as a result of a recapitalization of the Hanna Company in 1929 in which the respondent, owner of 1,500 shares of an issue of the preferred stock, exchanged this stock on the basis of one share for 1.27 shares of a new issue and received 1,500 new shares and the sum of $36,750.00 pursuant to an understanding that the fractional 0.27 share could be disposed of to the underwriting firm handling the transaction for $24.50 in cash for each fractional 0.27 share of new stock. The respondent returned the $36,750.00 as a dividend received from the Hanna Company (R. 6).

In December, 1931, the respondent was advised by the internal revenue agent in charge that the return reporting the amount of $36,750.00 as a dividend was considered correct, subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and should subsequent information be received which would materially change the amount of tax, it would be necessary, under existing laws, to redetermine the tax liability (R. 6).

On June 15, 1932, the respondent filed a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company, not the preferred stock here involved, had been incor-

rectly computed. This claim was allowed in full on September 24, 1932, and was paid with interest (R. 6).

In a letter dated October 6, 1932, following conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the internal revenue agent in charge at Cleveland, Ohio, that the amounts of cash received by the respondent and other stockholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other stockholders (R. 6).

On or about February 2, 1933, the respondent filed a claim for refund of $995.52 upon the ground of a loss in 1930 because the respondent's shares of the capital stock of the American Cuptor Corporation and Bertha-Consumers Company became worthless in that year. Consideration and action upon this claim were delayed awaiting the outcome of litigation on the question of the worthlessness of the stock of American Cuptor Corporation in 1930. Subsequently, in 1936, this claim was rejected in part and was allowed in the amount of $160.00, which was refunded to respondent. (R. 7.)

On June 29, 1934, the respondent filed a claim for refund in the amount of $6,454.09 which stated that it was "filed as an amendment and amplification of claim for refund filed February 1, 1933." A statement attached to the claim set forth the ground that the sum of $36,750.00 was not a taxable divi-

dend but represented the proceeds of the sale of the fractional shares of new stock which resulted in a profit of $7,411.50 and an overpayment of tax of $6,454.09. (R. 7–8.)

In a letter dated November 2, 1935, the respondent was advised by the Commissioner that, while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore, it is held that the claim was not filed within the limitations prescribed by law and cannot be allowed." On December 16, 1935, official notice of rejection in full of this claim was mailed to the respondent.

The petition in this suit in the Court of Claims was filed on December 12, 1935 (R. 1). On February 8, 1937, judgment was entered by the Court of Claims for the respondent in the amount of $5,536.97 (R. 11).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts and circumstances in this case, the respondent was entitled to a refund on the claim filed after the period of limitation had expired, but purporting to be an amendment to the prior claim timely filed.

2. In failing to hold that, under the facts and circumstances in this case, refund on the claim filed after the period of limitation had expired was barred by the statute of limitations, and that the

claim so filed could not be considered as an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In failing to enter judgment for the United States and to dismiss the petition.

SUMMARY OF ARGUMENT

The untimely second refund claim, setting forth a specific ground different from and in no manner related to the specific ground set forth in the timely first claim, is not an amendment of the timely claim and is barred by the statute of limitations, as applied by this Court and by the Second and Sixth Circuit Courts of Appeals. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), pending on petition for rehearing of denial of petition for certiorari; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718.

The fact that the Commissioner, through conferences with representatives of the Hanna Company, obtained information, before expiration of the period of limitation, which would support the ground set forth in the untimely refund claim is no reason to allow the late claim as an amendment of the timely claim.

The applicable Treasury regulation adopted pursuant to express authority granted in the statute of limitations states the same rule as the judicial decisions and expressly bars the late claim.

ARGUMENT

THE SECOND REFUND CLAIM WAS A WHOLLY NEW CLAIM AND WAS BARRED BY THE STATUTE OF LIMITATIONS

The income tax in question for the calendar year 1930 was levied pursuant to the Revenue Act of 1928 and was paid in quarterly installments in 1931, the last installment on December 15, 1931 (R 5–6). The Revenue Act of 1928, Sec. 322 (b) (1), provides that no refund shall be allowed or made after two years from the time the tax is paid, unless before the expiration of such period a claim therefor is filed by the taxpayer. The two-year period expired on December 15, 1933.

Revised Statutes, Sec. 3226, as amended by the Revenue Act of 1932, Sec. 1103 (a), provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax "until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *."[1] The refund claim

[1] The Revenue Act of 1926, Sec. 1113 (a), and the prior Revenue Acts, contain this same provision. The Revenue Act of 1928 does not repeat this provision and as found in the Revenue Act of 1926 it remained in effect until the Revenue Act of 1932 was enacted. Section 1103 (b) of the Revenue Act of 1932 provides that in suits relating to part of a claim disallowed before its enactment on June 6, 1932, the statute of limitations shall be the same as provided before the Revenue Act of 1932 was enacted. The refund claims

filed on February 2, 1933, hereinafter called the first refund claim,[2] sought to recover $995.52 solely on the specific ground of a loss on shares of the capital stock of the American Cuptor Corporation and the Bertha-Consumers Company alleged to have become worthless in 1930 (R. 7). Action by the Commissioner upon the first refund claim was delayed awaiting the outcome of litigation in respect of the worthlessness in 1930 of the stock of the American Cuptor Corporation. In 1936 this first refund claim was rejected in part and allowed in the amount of $160, which was refunded to the respondent.

The refund claim, hereinafter called the second refund claim, filed on June 29, 1934, six months after the period of limitation had expired on December 15, 1933, sought to recover $6,454.09 on the specific ground that $36,750, erroneously included in the 1930 return as a taxable dividend received from the Hanna Company during 1930, represented proceeds from the sale of new preferred stock of the Hanna Company upon its recapitalization in 1929 and actually resulted in a profit

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here involved were disallowed after June 6, 1932. Therefore R. S., Sec. 3226 as amended by Sec. 1103 (a) of the Revenue Act for 1932 applies to this case.

[2] The refund claim filed on June 15, 1932, to recover $420 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed, was allowed in full, and the amount was refunded (R. 6). This refund claim is not involved in this case.

of $7,411.50 rather than a dividend of $36,750 (R. 7–8).

The Commissioner disallowed the second refund claim for the reason that it was wholly unrelated to the first claim and was not filed in time (R. 8).

The court below allowed recovery on the second claim as an amendment of the first claim and held that this case is controlled by the principle of *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, certiorari denied, 293 U. S. 599; and *Con. P. Curran Printing Co.* v. *United States*, 15 F. Supp. 153 (C. Cls.), certiorari denied, April 26, 1937.

The Government contended in the court below, and contends here, that this case is governed by the rule announced in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, June 1, 1937, petition for rehearing, on the ground that the petition in the present case was pending, now pending; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631; *Swedish Iron & Steel Corporation* v. *Edwards*, 1 F. Supp. 335 (S. D. N. Y.),

affirmed *per curiam* on the authority of the *Prentiss* case, 69 F. (2d) 1018 (C. C. A. 2d). The court below made no reference to these cases in its opinion.

The Government submits that a timely claim for refund for a stated amount on a specified ground cannot be amended, after the period of limitation has expired, by a second claim for a different and greater amount on a different specific ground which, under the Commissioner's administrative practice, was not considered in passing upon the first claim. *United States* v. *Henry Prentiss & Co., supra; New York Trust Co.* v. *United States, supra; United States* v. *Richards, supra; Bryant Paper Co.* v. *Holden, supra; Swedish Iron & Steel Corporation* v. *Edwards, supra.*

In the *Prentiss* case this Court held that a timely claim for refund for a stated amount on the specific ground that abnormal conditions affecting the taxpayer's invested capital and income required a special assessment under Sections 327 and 328 of the Revenue Act of 1918, which, under the statute and the administrative practice, required no consideration of the correctness of the evaluation of the taxpayer's invested capital, could not be amended by a second claim, after the period of limitation, setting forth evidence of the correct evaluation of invested capital and requesting a recomputation of the invested capital and of the tax under this normal method. This Court stated

that the conclusion that the second claim was wholly new and not an amendment of the first claim was required both by the procedural analogy to amendments of pleadings and by the necessities and realities of administrative practice, since the determination of the special assessment under Section 327 (d) of the Revenue Act of 1918 did not require and had no relation to a correct evaluation of invested capital.

Several cases have applied the rule of the *Prentiss* case and have approved the refusal of refunds in situations indistinguishable from the present case. In the *Bryant* case, *supra*, the timely claim was based on depreciation of land, buildings and machinery and the late claim was based on depreciation of a contract. Denying a petition for a rehearing after the decisions of this Court in the *Memphis*, *Prentiss* and *Factors* cases, the Sixth Circuit Court of Appeals distinguished the *Memphis* and *Factors* cases on the ground that they involved specific amendments relating to and explaining timely *general* refund claims and held that the specific late claim was a complete departure from the *specific* timely claim in the *Bryant* case and that, therefore, the case should be aligned with the *Prentiss* case.

In the *Richards* case, *supra*, the Sixth Circuit Court of Appeals followed its decision in the *Bryant* case, fully discussed the decisions of this Court on the question, and held that a specific re-

fund claim, based on a deduction of dividends on the ground they were paid out of capital, could not be amended, after the period of limitation, by a specific claim based on a deduction of the taxpayer's proportionate share of a partnership's excess profits taxes for 1917.

In the *New York Trust* case, *supra,* the Second Circuit Court of Appeals, in an opinion by Circuit Judge Swan discussing the decisions of this Court, held that a specific timely claim, based upon the inclusion of a wife's income in the calculation of surtax and upon depreciation, could not be amended by a late claim based on a deduction of a proportionate share of a partnership's excess profits taxes for 1917.

In the *Swedish Iron & Steel* case, *supra,* decided before the decisions of this Court on the question, the District Court held that a timely claim for a special assessment for 1918 under Section 210 of the Revenue Act of 1917 could not be amended by a late claim on the wholly different ground of a deduction of net loss for 1919. The court stated at page 337:

> To allow an entirely new ground for relief to be presented after the statutory period has [redacted] appears to me no different than to allow the original and only claim for refund to be filed at that time. Clearly the latter is forbidden by the statute. In my opinion, the former is also. * * *

The Government submits that the *Bryant, Richards* and *New York Trust* cases have correctly applied the rule of the *Prentiss* case by refusing to allow specific timely claims to be "amended" by late claims on wholly different specific grounds. In the present case the original timely claim clearly did not charge overpayment of taxes generally. The claim asked for a refund of a stated sum and specified particular facts and grounds why it should be refunded. This is not a case where the claimant left the grounds of challenge open in a general claim and where the Commissioner had only himself to blame for not promptly rejecting a general claim for insufficiency of form and insisting, at the outset, upon a full disclosure of the grievance. The ground of the first claim was stated specifically and the Commissioner was under a duty to consider only the limited question it presented concerning the worthlessness of the capital stock of the American Cuptor Corporation and the Bertha-Consumers Company.

The respondent asserted the second and additional claim for the first time on June 29, 1934. It was then too late to file a new claim for refund and, consequently, the respondent sought to assert the additional claim "as an amendment and amplification" of the first claim. The old claim sought refund of $995.52 and the new claim was made for $6,454.09. The old claim asserted refund should be made solely because the capital stock of the two

named corporations had become worthless in 1930. The new claim relied solely upon the entirely different and unrelated ground that the amount received from the Hanna Company, wholly unrelated to the other two corporations, and included in the return as a dividend was proceeds on sale of new stock.

Even the theories of recovery were different. The first claim did not question the correctness of gross income reported in the return but sought additional deductions from gross income. The second claim sought an adjustment of gross income by treating $29,338.50 of the amount of $36,750.00 which had been reported as dividends from the Hanna Company as the basis for the new stock which was sold and, therefore, as a return of capital and not as gross income. It is apparent that the investigation required to determine the merits of the first claim would not lead to a consideration of the grounds of the second claim.

The decisions of this Court relied upon by the court below, *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, and also the case of *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, are clearly distinguishable. In the *Memphis, Factors* and *Moore* cases this Court held that timely *general* refund claims not specifying any grounds could be amplified and amended and explained by

specific amendments, after the period of limitation, in situations where, applying the analogy of pleadings in a law suit, such an amendment to a complaint would be allowed and where, under the usual administrative practice, the Commissioner, in considering the timely general claim, would be required to ascertain the facts and grounds later formally set forth in the late amendment.

In the *Bemis* case this Court held that timely refund claims for 1918 and 1919 for a special assessment on the three specific and independent grounds contained in Section 327 (a), (c) and (d) of the Revenue Act of 1918, accompanied by facts and arguments in support of each ground, could be amended, after the period of limitation, by a claim which contained "no change of importance, unless importance be attached to the form of the relief demanded." 289 U. S. 28, 32. The amendment added the alternative prayer for relief to the effect that if a special assessment were denied invested capital should be redetermined. This Court stated that the analogy to amendment of pleadings supported the amendment because the timely claims disclosed the facts and the substance of the grievance, omissions from invested capital, and the prayer for alternative relief was within the general rule that on trial relief appropriate to the facts pleaded will be granted, whether the pleader has prayed for it or not. This Court also stated that the administrative practice supported allowance of

the amendment because the Commissioner, in order to dispose of the timely claims, was required to ascertain whether the valuation of invested capital was wrong in a determinable amount and, having gone that far, the Commissioner should, as he did, redetermine invested capital. The amendment asked no more but was restricted to that question of invested capital.

The court below also relied upon its former decisions in *Con. P. Curran Printing Co.* v. *United States*, 15 F. Supp. 153, certiorari denied, April 26, 1937, and *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, certiorari denied, 293 U. S. 599. In the *Curran* case the timely claim was for "inadequate depreciation taken on the return, $17,641.30", among other reasons. The late claim was for depreciation of a leasehold which was not brought to the Commissioner's attention until the period of limitation had expired. Although the decision perhaps might have been placed upon the ground, suggested in the court's opinion, at page 158–159, that the timely refund claim was a general claim for depreciation which could be amended to claim a specific and additional item of depreciation, which is not clear from the findings of fact, the court chose to rely expressly upon the *Youngstown* case.

In the *Youngstown* case a timely refund claim on November 3, 1926, for $20,417.82 for 1922 on the specific ground of final determination of depletion depreciation and amortization of iron ore

property was followed by an audit which resulted in a determination, after the period of limitation expired, of a deficiency of $261,052.50 and then a redetermination by the Board of Tax Appeals on stipulation that the taxpayer had overpaid not only the sum demanded in the timely refund claim but also an additional sum of $53,875.69 based on different grounds of inventories, depreciation, obsolescence and depletion in addition to grounds in the timely claim. The Commissioner refused to refund the additional sum on the new grounds because they were not presented in a timely claim and they were thereafter set forth, after the period of limitation had expired, in a second claim. The Court of Claims allowed recovery of the additional sum and attempted to distinguish the *Prentiss* case on the ground that upon the audit of the timely claim the Commissioner considered all the facts which were later set forth in the second claim. It is submitted that this distinction is insufficient and that the *Youngstown* case was incorrectly decided because, even though the audit disclosed the facts, it was improper to allow an amendment of the first claim based on a specific ground by the second claim on different specific grounds and for an additional amount. Even this distinction is not present here because the first claim on specific grounds was not followed by an audit revealing the facts and grounds relied upon in the second claim.

The decisions of this Court permitting amendments do not permit the change of the first refund

claim here for a stated amount on the specific ground of worthlessness of stock of two corporations into a claim for a greater amount upon the wholly different specific ground of disposition of stock of a third corporation in no manner related to the other two corporations.

The two tests approved by this Court, (1) the analogy of amendments of pleadings and (2) the necessities and realities of administrative practice, disclose clearly that the second claim is wholly new and cannot be allowed as an amendment of the first claim.

1. Even under the most liberal rule of amendment of pleadings (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68) a complaint stating a cause of action based upon the worthlessness of the stock of the American Cuptor Corporation and the Bertha-Consumers Company could not be changed by amendment, after the period of limitation had expired, into a cause of action based upon the disposition of the stock of the Hanna Company in a transaction wholly unrelated to the worthlessness of the stock of the other two corporations. Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422; *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 494; *Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Union Pacific Ry.* v. *Wyler*, 158 U. S. 285, 296.

2. This Court has stated that sound judicial determination of the situations in which amendments

of refund claims are permissible after the period of limitations has expired must be based upon the realities of the administrative practice because such determination will regulate the conduct of the administrative officials. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 69; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 85.

A. The first claim did not require or suggest examination of the grounds of the second claim. Following the usual administrative practice, the first refund claim was considered, and allowed in part, solely on the specific grounds of worthlessness of stock upon which it exclusively relied. These grounds were narrow and not of a character calculated to suggest either the necessity of a general audit or an examination of the wholly unrelated grounds and facts later presented in the second claim. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 86.

B. The first claim was not a general one which the Commissioner might have promptly disallowed as formally defective in order to avoid the possibility of a later valid amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 94. The Commissioner was required to pass upon the specific grounds contained in the first claim.

C. The second claim required examination of the records of a different taxpayer and a different commercial entity, the Hanna Company, which was in

no manner related to the two corporations concerned in the first claim, and thus forced the inquiry into paths far removed from those to which the original claim directed it. *New York Trust Co.* v. *United States,* 87 F. (2d) 889, 891; *United States* v. *Richards,* 79 F. (2d) 797, 801 (C. C. A. 6th). Therefore, the grievances presented by the first and second claims differ so essentially that the timely assertion of the first cannot aid the tardy assertion of the second. *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, 87.

All of these considerations indicate that the necessities and realities of the administrative practice involved where a refund claim on a specific ground is asserted require the conclusion that such a claim may not be amended, after the period of limitation has expired, by a second claim on different and unrelated specific grounds.

This conclusion that the respondent cannot recover on the second refund claim is not affected by the finding of fact that the Commissioner, following conferences with representatives of the Hanna Company and before expiration of the period of limitation, had advised the internal revenue agent in charge at Cleveland, Ohio, that the cash received by the respondent and other shareholders of the Hanna Company should be taxed in the manner later claimed too late in the second refund claim (R. 6–7). It does not appear that the Commis-

sioner advised the revenue agent that the respondent had overpaid the tax on this item. It does not appear that the Commissioner, in connection with this information, or otherwise, knew that the respondent or any other shareholder of the Hanna Company had overpaid a tax on this item until the second refund claim was filed. For all that appears from the complaint (R. 2) or the findings of fact (R. 6), the item of $36,750 received from the Hanna Company was reported in the return with the total of dividends of $110,891.50 without any explanation and so far as the Commissioner was advised, even after conferences with representatives of the Hanna Company, might have represented taxable dividends on other stock of the Hanna Company and not the amount received on the sale of new preferred stock.

The respondent cannot rely on the information obtained by the Commissioner from representatives of the Hanna Company as an amplification or explanation of the first refund claim which relied on wholly different grounds and made no reference to this information. It is clear that the administrative practice upon examination of a refund claim for $995.52 on the specific ground involving worthlessness of stock of two corporations would not include consideration of the fact that the taxpayer might be entitled to a refund of a greater amount on the wholly different ground that a reported dividend was proceeds of sale of stock of

a third corporation simply because some information about the sale of stock had been received from representatives of the third corporation.

The court below, however, in its opinion (R. 11) made the statement, not supported by the findings of fact, that the Commissioner had determined, before expiration of the period of limitation, that the respondent had overpaid the tax on the item later set forth in the second claim. The court then stated that action on the first claim required a redetermination of the entire tax liability, citing *Lewis* v. *Reynolds,* 284 U. S. 281. That case holds merely that where a taxpayer prevails on a specific ground for refund the Commissioner *may* reaudit the return and refuse the refund if the tax has not been overpaid.

The Commissioner is not *required* to determine whether a refund is due on a specific ground not related to the specific ground in the claim before him. The facts of this case illustrate the impossibility of observing such a requirement. An administrative system able to relate information received from a corporation to all of the refund claims of all the stockholders of the corporation relying on specific grounds not related to the corporation, has not been devised and is not needed where a simple and efficient determination of refund claims is obtained by requiring each claimant, to whom the facts are readily available, to set them forth in a timely refund claim.

Even if the fact that the respondent had overpaid the tax were brought to the attention of the Commissioner in some manner other than in a timely claim for refund, that circumstance would not satisfy the statutory requirement for a timely refund claim. *United States* v. *Richards*, 79 F. (2d) 797, 801 (C. C. A. 6th). In the *Richards* case the taxpayer in his return claimed a deduction for his proportion of the excess profits taxes of certain partnerships and the Commissioner in denying the deduction was advised of the taxpayer's contention. The court held, however, that this knowledge was no reason to allow the deduction to be asserted in a late refund claim as an amendment of a timely claim on another ground. The court stated at page 801:

> The required statutory method for bringing an overassessment to the attention of the Commissioner is by a timely claim for refund, and without such claim there is nothing upon which the Commissioner may act.

The construction of this Court's decisions which we have urged here has been adopted by the applicable Treasury regulations promulgated pursuant to the express statutory authority found in R. S., Sec. 3226, as amended (Sec. 1113 (a), Revenue Act of 1926), which provides that no suit shall be maintained to recover any internal revenue tax "until a claim for refund or credit has been led with the

Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *." The applicable provision of law in regard to refund claims is Sec. 322 (b) (1) of the Revenue Act of 1928, *infra*, which provides that no refund shall be allowed unless a claim is filed within the two years after payment of the tax.

Prior to May 1, 1929, Treasury Regulations 74, Art. 1254, Revenue Act of 1928, provided in respect of the form of refund claims merely that "All facts relied upon in support of the claim should be clearly set forth in detail under oath."[3] This general provision was the only regulation in respect of the refund claims involved in the cases decided by this Court. In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 66, this Court expressly recognized that this form of the Treasury regulation, involved in all the cases decided by this Court, had been changed by Treasury Decision 4265 in effect on May 1, 1929.[4] All of the cases herein discussed were decided on the basis of the former regulation.

The tax here involved was imposed for 1930 under the Revenue Act of 1928 and was paid in 1931. Treasury Decision 4265, adopted pursuant

[3] This same sentence also appeared as the only requirement for the form of refund claims in Treasury Regulations 69, Art. 1304, Revenue Act of 1926; Regulations 65, Art. 1306, Revenue Act of 1924, Regulations 62, Art. 1036, Revenue Act of 1921; Regulations 45, Art. 1036, Revenue Act of 1918.

[4] See Mim. 4092 of October 30, 1933, Cumulative Bulletin XII-2, pages 96, 97.

to the authority of R. S., Sec. 3226 as amended (Sec. 1113 (a) of the Revenue Act of 1926) provided in part that on and after May 1, 1929:

> (2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

The first refund claim was filed on February 2, 1933. Treasury Regulations 77, Article 1254, approved on February 10, 1933, and adopted pursuant to the authority of the same provision of law in R. S., Sec. 3226 as amended (Sec. 1103 (a) of the Revenue Act of 1932) continued the requirement of T. D. 4265 in practically the same language, as follows:

> ART. 1254. *Claims for refund by taxpayers.*—* * * The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to appraise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period.[5]

[5] This provision is repeated without change in Article 322–3 of Regulations 86 and 94 under the Revenue Acts of 1934 and 1936.

The second refund claim, setting forth for the first time the ground of recovery now relied upon, was filed on June 29, 1934, and after expiration of the period of limitation on December 15, 1933. The respondent had almost a year after adoption of Treasury Regulations 77 on February 10, 1933, to comply with Article 1254 before the period of limitation expired.

Article 1254 prohibits a refund or credit on the second claim. R. S., Sec. 3226, as amended, prohibits maintenance of any suit to recover any internal revenue tax unless a claim has been filed according to the law and regulations. No such claim was filed and this suit cannot be maintained because the second refund claim was not filed according to the law and the valid regulation.

Treasury regulations which are adopted pursuant to statutory authority and which provide a reasonable means to enforce and administer the tax laws have the force of law and must be obeyed. *Morrissey* v. *Commissioner,* 296 U. S. 344, 354–5; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Boske* v. *Comingore,* 177 U. S. 459, 469. One type of valid regulation supplies detailed rules for enforcement of the general terms of the statute, as in the present case. *Morrissey* v. *Commissioner, supra; Fawcus Machine Co.* v. *United States, supra.* The regulation involved here is authorized not only by the general authority granted

to the Commissioner, with the approval of the Secretary of the Treasury, to prescribe all needful regulations to enforce the Revenue Acts, Revenue Act of 1928, Sec. 62, but also by the specific statutory authority to regulate refund claims. R. S., Sec. 3226, as amended.

The fact that, in addition to the general statutory authority to prescribe regulations, specific statutory authority has been granted to regulate filing of refund claims indicates that Congress thought this matter of the time of filing refund claims particularly should be administered by regulations. The difficulty of application of the judicial tests, necessarily indefinite, by administrative officers to determine when a second refund claim is merely an amendment and therefore timely, supports the reasonableness of the regulation which sets forth a clear rule easily administered. Enforcement of this rule produces a fair and certain operation of the statute of limitations easily understood by the taxpayers as well as by the administrative officials.

Reenactment of the general statutory authority to make all needful rules and regulations, Section 62 of the Revenue Acts of 1932, 1934, and 1936, and reenactment of the specific statutory authority to make regulations concerning refund claims after adoption of T. D. 4265, Section 1103 (a) of the Revenue Act of 1932, is a clear indication of Congressional approval of the regulation. *Morrissey* v. *Commissioner, supra; Murphy Oil Co.* v. *Burnet,*

287 U. S. 299, 302–303; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583–585; *Brewster* v. *Gage*, 280 U. S. 327, 337.

The Government submits that the regulation which bars the refund here sought is authorized by statute, provides a reasonable rule which can be fairly and efficiently administered, and should now be enforced. Indeed, the regulation merely expresses the requirement of the statute of limitations determined by judicial decisions apart from the regulation.

CONCLUSION

The second refund claim presented a wholly new claim which was barred by the statute of limitations under the applicable judicial decisions and Treasury regulations. Therefore, this suit may not be maintained, and the judgment of the court below should be reversed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
Special Assistants to the Attorney General.
EDWARD J. ENNIS,
Attorney.

NOVEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 810, 861:

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have

been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VIII–1 Cumulative Bulletin 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed,

and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

* * * * *

Treasury Regulations 77, Revenue Act of 1932, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim

which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 1257.

* * * * *

Treasury Regulations 74, Revenue Act of 1928, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. A separate claim on such form shall be made for each taxable year or period. All facts relied upon in support of the claim should be clearly set forth in detail under oath.

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